

STATE OF MICHIGAN
COURT OF APPEALS

CITY OF WAYNE,

Plaintiff-Appellee,

v

STURDY HOMES CORPORATION,

Defendant-Appellant.

UNPUBLISHED

November 10, 2005

No. 256056

Wayne Circuit Court

LC No. 01-143017-CH

Before: Saad, P.J., and Jansen and Markey, JJ.

PER CURIAM.

Defendant Sturdy Homes Corporation appeals as of right from a trial court order granting plaintiff City of Wayne’s motion for summary disposition, ordering that plaintiff is the owner in fee simple of land described as lots 82, 83, 84, and 85 in Louis Savage Garfield Park Subdivision in Wayne County (hereinafter “lots 82-85”), and ordering that the court order be recorded with the Wayne County Register of Deeds to vest good title in plaintiff. On appeal, defendant argues that the trial court erred in granting summary disposition pursuant to adverse possession and equitable principles when it did not receive proper notice to redeem the property pursuant to MCL 211.140 and MCL 211.141,¹ when the State of Michigan acquired the property through its forfeiture process. We affirm.

I

¹ The Legislature has extensively amended the procedure to collect taxes assessed after December 31, 1998, that are delinquent, replacing the statutes here at issue with a system of forfeiture, foreclosure, and sale. See 1999 PA 123. Some of the statutes noted in this case have been repealed effective December 31, 2003, or will be repealed effective December 31, 2006. *Id.* (enacting §§ 4 and 5); 2001 PA 94 (enacting § 1). Statutory sections contained within the General Property Tax Act (GPTA) refer to the statutes in effect at the time the original complaint was filed, December 20, 2001. See *In re Wayne Co Treasurer Petition*, 265 Mich App 285; 698 NW2d 879 (2005).

Defendant purchased lots 82, 83, 84, 85, 205, and 206, on February 7, 1972 for \$2,500. Tax rolls indicate that taxes were not paid for lots 82-85 in 1977, 1979, 1980, and 1981, but they, apparently, were paid in 1976 and 1978. In 1981, the State of Michigan acquired the property through its forfeiture process pursuant to defendant's non-redemption from a 1980 tax sale. In 1982, the Michigan Department of Natural Resources (DNR) conveyed the property to plaintiff for \$1.00. No taxes have been paid on the property since plaintiff acquired it.

On December 20, 2001, plaintiff filed a complaint to quiet title alleging that: (1) defendant at one point was the owner of a piece of property known as lots 82-85; (2) plaintiff obtained from the State of Michigan a deed to the property subsequent to the property not being redeemed; (3) plaintiff has had equitable title for several years; (4) plaintiff was in the process of selling the property for development and learned there was a cloud on the title; (5) plaintiff needs to clear the title for title insurance; and (6) plaintiff has carried the property on its tax role for several years having taxed no individual, corporation, or partnership. Defendant filed an answer to the complaint in which it asserted that it had never received notice of delinquent taxes and that plaintiff had not even claimed as such in its complaint.

Subsequently, plaintiff filed a motion for summary disposition, and contended that there were no genuine issues of material fact, and that defendant failed to state a valid defense.² A hearing was conducted on plaintiff's motion for summary disposition, and the trial court stated that once plaintiff produces the deed as prima facie evidence the burden is on defendant to show that it did not receive notice. The trial court granted plaintiff's motion for summary disposition finding that defendant could not meet its burden, and further ordered that plaintiff was the owner in fee simple of lots 82-85.

Defendant filed a delayed application for leave with this Court. This Court issued an order under MCR 7.205(D)(2), reversing the order granting plaintiff summary disposition because defendant "stated a valid defense" to plaintiff's claims (Docket No. 245828).

Subsequently, defendant filed a motion for summary disposition and contended that plaintiff failed to state a cause of action and or raise genuine issues of material fact because it failed to plead or provide evidence that it complied with the statutory requirements to commence the redemption period and quiet title in itself.

Plaintiff filed a motion to amend its complaint to include adverse possession, stating that it had learned through additional discovery that it has openly and notoriously possessed the property for more than fifteen years, and contended in its brief in support that the amendment would not prejudice defendant. Thereafter, plaintiff filed a motion for summary disposition, and contended that: (1) defendant made no tax payments 1977, 1979, 1980, and 1981, at which time the State of Michigan acquired title in September 1981 through its forfeiture process; (2) the

² We note that plaintiff did not reference which provision of the court rule its motion was brought pursuant to, but defendant treated the motion as a MCR 2.116(C)(9) motion for failure to assert a defense, but plaintiff's motion did reference "no genuine issue of material fact," which suggests the motion was brought pursuant to MCR 2.116(C)(10).

State through the DNR deeded the property to plaintiff; (3) defendant acknowledged tax deficiencies;³ (4) plaintiff has maintained the property since it acquired title in 1982 and has listed it as plaintiff owned property; (5) laches applies; (6) Michael Tobin, an officer for defendant, stated that defendant mailed in a list of properties it wanted to pay taxes on and that at a certain point lots 82-85 were not listed, thus, defendant actively decided not to pay;⁴ and (7) plaintiff has openly, notoriously and adversely possessed the property for over twenty years having cared for it, listed it on city records, and mowed it, thus, plaintiff has acquired title through adverse possession.

Defendant filed a response to plaintiff's motion to amend the complaint, and argued that the adverse possession claim was not properly plead, was factually and legally void of any substance, and was futile. In addition, defendant filed a response to plaintiff's motion for summary disposition, and contended there was no notice and that the adverse possession was not pleaded properly and had no relevance to the case.

A hearing was conducted on the parties cross motions for summary disposition. The trial court granted plaintiff's motion for summary disposition, and seemed to rely on *D&W Rottschafer, Inc v Grand Rapids*, 346 Mich 687; 78 NW2d 624 (1956), in applying a combination of adverse possession, equitable estoppel, and laches.

II

On appeal, defendant argues that the trial court erred in granting summary disposition to plaintiff on the basis that it acquired title to the property by a combination of adverse possession, equitable estoppel,⁵ and laches,⁶ without formally granting plaintiff's motion to amend its complaint and allowing defendant to answer and properly oppose the complaint.

³ Defendant in its answers to plaintiff's request for admissions admitted it did not pay taxes from 1981 to 2003, but claimed it was because it was not invoiced.

⁴ Defendant owned a significant number of properties in southeast Michigan. Tobin testified in a deposition that typically in the 1980s and 1990s defendant would allow tax deficiencies to continue for a period of two or three years on its properties, and then pay off the deficiencies and penalties during the redemption process. Apparently, each year, defendant would mail a list of its Wayne County properties to request outstanding amounts owed, and would redeem to save the properties from tax sales. Defendant's list of properties sent to Wayne County during the challenged years did not include lots 82-85.

⁵ With regard to equitable estoppel, in *Conagra, Inc v Farmers State Bank*, 237 Mich App 109, 140-141; 602 NW2d 390 (1999), this Court stated:

Equitable estoppel may arise where (1) a party, by representations, admissions, or silence intentionally or negligently induces another party to believe facts, (2) the
(continued...)

A. Standard of Review

This Court will not reverse a trial court's decision on a motion to amend a complaint absent an abuse of discretion that results in injustice. *Phillips v Deihm*, 213 Mich App 389, 393; 541 NW2d 566 (1995). We review a trial court's equitable decisions de novo. *Yankee Springs Twp v Fox*, 264 Mich App 604, 611; 692 NW2d 728 (2004). This Court also reviews de novo the grant or denial of summary disposition to determine if the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). When deciding a motion for summary disposition, a court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence submitted in the light most favorable to the nonmoving party. *Id.* A motion for summary disposition based on the lack of a material factual dispute must be supported by documentary evidence. MCR 2.116(G)(3)(b); *Scalise v Boy Scouts of America*, 265 Mich App 1, 10; 692 NW2d 858 (2005). The moving party must specifically identify the matters which have no disputed factual issues, MCR 2.116(G)(4); *Maiden, supra* at 120, and has the initial burden of supporting his position by affidavits, depositions, admissions, or other documentary evidence, *Smith v Globe Life Ins Co*, 460 Mich 446, 455; 597 NW2d 28 (1999). The party opposing the motion then has the burden of showing by evidentiary materials that a genuine issue of disputed fact exists, *Smith, supra*, and the disputed factual issue must be material to the dispositive legal claims, *Auto Club Ins Ass'n v State Automobile Mutual Ins Co*, 258 Mich App 328, 333; 671 NW2d 132 (2003). When the burden of proof at trial would rest on the nonmoving party, the nonmovant may not rest upon mere allegations or denials in the pleadings, but must, by documentary evidence, set forth specific facts showing that there is a genuine issue for trial. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996).

B. Motion to Amend the Complaint

Defendant argues that the trial court improperly granted plaintiff's motion to amend its complaint. MCR 2.118(A)(2) states: "Except as provided in subrule (A)(1), a party may amend a pleading only by leave of the court or by written consent of the adverse party. Leave shall be freely given when justice so requires." Further, our Supreme Court has provided that:

(...continued)

other party justifiably relies and acts on that belief, and (3) the other party is prejudiced if the first party is allowed to deny the existence of those facts.

"Equitable estoppel is not an independent cause of action, but instead a doctrine that may assist a party by precluding the opposing party from asserting or denying the existence of a particular fact." *Id.* at 140-141.

⁶ Laches bars a party from bringing a delayed claim when the other party has been prejudiced by the delay, *Dep't of Public Health v Rivergate Manor*, 452 Mich 495, 507; 550 NW2d 515 (1996), and requires a showing of prejudice, the passage of time, and lack of diligence. *Torakis v Torakis*, 194 Mich App 201, 205; 486 NW2d 107 (1992).

A motion to amend ordinarily should be granted, and denied only for particularized reasons:

"In the absence of any apparent or declared reason - such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc. - the leave sought should, as the rules require, be 'freely given.'" [*Ben P Fyke & Sons, Inc v Gunter Co*, 390 Mich 649, 656; 213 NW2d 134 (1973), quoting *Foman v Davis*, 371 US 178, 182; 83 S Ct 227; 9 L Ed 2d 222 (1962).]

"On a motion to amend, a court should ignore the substantive merits of a claim or defense unless it is legally insufficient on its face and, thus, . . . it would be 'futile' to allow the amendment." *Fyke, supra* at 660. Where a plaintiff merely restates or slightly elaborates on counts or allegations already pleaded, an amendment is futile. *Dowerk v Oxford Charter Twp*, 233 Mich App 62, 76; 592 NW2d 724 (1998).

The trial court did not abuse its discretion in allowing plaintiff to amend its complaint. There is nothing before this Court supporting that the amended complaint caused undue delay, was the result of bad faith or dilatory motive, was the result of repeated failures to cure deficiencies, caused undue influence, or was futile. The amendment was not futile as it was more than a restatement of the previous allegations because it added the adverse possession claim, which as discussed, *infra*, is a claim with merit.

Defendant also contends that if it had known the Court was considering the motion it would have presented further evidence to the contrary. However, defendant did respond to the motion. Defendant filed a response to the motion for the amended complaint and a response to the motion for summary disposition, and argued that: (1) it would be futile to add adverse possession; (2) the adverse possession claim was not properly plead; and (3) mowing the grass is not enough to support a claim for adverse possession. To the extent defendant did not raise arguments or present further evidence in its response motion, it cannot now claim reversible error on the account of its own omissions. Reversible error must be predicated on trial court error, not upon an error contributed to by the aggrieved party's plan or negligence. *Lewis v LeGrow*, 258 Mich App 175, 210; 670 NW2d 675 (2003). Thus, any error in this regard was contributed to by defendant's plan or negligence and is not grounds for reversal.

C. Adverse Possession

Defendant argues that the trial court erred in granting summary disposition on the basis of adverse possession, equitable estoppel, and laches. The trial court, following *D&W Rottshafer, supra*, applied both adverse possession and equitable principles in granting plaintiff's motion for summary disposition. In *D&W Rottshafer, supra*, an ejectment case, the court applied adverse possession and estoppel where the municipality had exercised acts of ownership for fifteen years via its tax deeds and more than ten years had elapsed before the claim was commenced.

We find on review de novo that the trial court erred in applying *D&W Rottshafer*, which was an ejectment case to the present situation, a adverse possession claim with a question regarding statutory notice for redemption. A court may not act in equity to avoid the application

of a statute. *Stokes v Millen Roofing Co*, 466 Mich 660, 671; 649 NW2d 371 (2002). Rather, where a statute controls the requirements of redemption, equitable considerations are inapplicable "absent fraud, accident, or mistake." *Freeman v Wozniak*, 241 Mich App 633, 637; 617 NW2d 46 (2000), quoting *Senters v Ottawa Savings Bank*, 443 Mich 45, 55; 503 NW2d 639 (1993). The General Property Tax Act (GPTA), MCL 211.1 *et. seq.*, controls the taxation of property and establishes the procedures through which property delinquent for taxes may be conveyed. The GPTA specifically sets forth how property conveyed through a tax deed may be redeemed, notice requirements, and what happens if the GPTA's notice requirements are not met. MCL 211.73c; MCL 211.74; MCL 211.131e; MCL 211.140; MCL 211.141.

In this case, the trial court repeatedly noted that its decision was based on equitable principles and adverse possession. Based on the record, the trial court erred in relying on equitable principles because there is a controlling statutory scheme that sets forth the requirements for redeeming property conveyed through a tax deed and what should happen if the statutory scheme's notice requirements are not met. MCL 211.73c; MCL 211.74; MCL 211.131e; MCL 211.140; MCL 211.141; *Freeman, supra* at 637. There have been no specific allegations of fraud, accident, or mistake raised in this case to support the reliance on equitable principles. Therefore, the use of equitable principles was error.

However, we affirm the trial court on the basis of adverse possession alone. This Court need not reverse where the trial court reached the right result for the wrong reason. *Taylor v Laban*, 241 Mich App 449, 458; 616 NW2d 229 (2000). We find on review *de novo* that plaintiff's motion for summary disposition is properly granted on the basis of adverse possession.

To support a claim for adverse possession, plaintiffs were required to show that during the fifteen-year statutory period they had actual, visible, open, notorious, exclusive, and uninterrupted possession of the property that was hostile to the owner and under cover of a claim of right. *Rozmarek v Plamondon*, 419 Mich 287, 295; 351 NW2d 558 (1984) (citation omitted). The true owner must have actual knowledge of the adverse possession, or alternatively, the possession must be so notorious as to raise the presumption to the world that the possessor claims ownership. *Ennis v Stanley*, 346 Mich 296, 301; 78 NW2d 114 (1956). Generally, the extent of the actions necessary to constitute adverse possession depends on the character of the land involved. See *Davids v Davis*, 179 Mich App 72, 83; 445 NW2d 460 (1989). The possession must be continuous. *Beecher v Ferris*, 117 Mich 108, 110; 75 NW 294 (1898); *Duck v McQueen*, 263 Mich 325, 327-328; 248 NW 637 (1933).

In plaintiff's motion for summary disposition, it contended, with regard to lots 82-85, that since September 1982: (1) it had maintained the property by virtue of cutting or mowing weeds and caring for the lawn on lots 82-85 on a continuous basis for at least twenty years; (2) listed it on its city owned property list; (3) listed it with the Register of Deeds' office as property owned by plaintiff; and (4) when inquiries were made by parties interested in acquiring said property over the last twenty years, plaintiff indicated that it was the owner. In response to plaintiff's motion for summary disposition, defendant attached no documentary evidence to dispute the supported contentions of plaintiff, and argued: (1) plaintiff did not plead proper elements and (2) periodically cutting wild grass does not constitute actual possession to constitute adverse possession (citing *Bankers Trust Co v Robinson*, 280 Mich 458; 273 NW 768 (1937)).

Plaintiff's acts of regularly maintaining the property, listing the property, and informing people interested in the property that it was plaintiff's property, openly indicated an assumption of control and was consistent with the character of possession of the property. We find that this supports that plaintiff's behavior was "actual, visible, open, and notorious."

Plaintiff's alleged possession can be construed as hostile because it was possessing the land of another up to a recognizable boundary. See *Gorte v Dep't of Transportation*, 202 Mich App 161, 170; 507 NW2d 797 (1993). There was documentary evidence supporting that plaintiffs had been mowing the disputed property for over twenty years. To support a claim of adverse possession, the "acts of possession must be open and of a hostile character, but it is sufficient if the acts of ownership are of such character as to indicate openly and publicly an assumed control or use such as is consistent with the character of the premises in question." *Rose v Fuller*, 21 Mich App 172, 175; 175 NW2d 344 (1970), citing *Monroe v Rawlings*, 331 Mich 49,52; 49 NW2d 55 (1951); *Denison v Deam*, 8 Mich App 439, 443; 154 NW2d 587 (1967). Regarding these "hostile" and "exclusive" elements, plaintiff's maintenance of the property constituted "use inconsistent with the right of the owner;" this was done without permission and would have "entitled the owner to a cause of action against the intruder." *Mumrow v Riddle*, 67 Mich App 693, 698; 242 NW2d 489 (1976). We find that plaintiff's use was exclusive and hostile.

A claimant attempting to establish adverse possession must act under a claim of right. In the context of an adverse possession claim, "claim of right" contemplates that the claimant possesses the land "with [the] intent to claim the land as his or her own, and not in recognition or subordination to [the] record title owner." Black's Law Dictionary, (6th ed.), p 170. The claimant must only intend to take title. See *Smith v Fenley*, 240 Mich 439, 441-442; 215 NW2d 353 (1927). The payment of taxes is persuasive evidence of a claim of right in an adverse possession action. See *Davids, supra* at 85; *Burns v Foster*, 348 Mich 8, 15; 81 NW2d 386 (1957); *Gardner v Gardner*, 257 Mich 172, 176; 241 NW2d 179 (1932). Our Supreme Court in *McVannel v Pure Oil Co*, 262 Mich 518, 528; 247 NW2d 735 (1933), stated that "one in possession of land, claiming title, is bound to pay the taxes upon it" (citation omitted). We note that although plaintiff was exempt from taxes, it carried the property on its tax roll, and was listed as the owner for tax purposes, but as exempt. And, that the fact that defendant was not paying taxes further supports that plaintiff was in possession of the land. The fact that plaintiff was the owner for tax purposes would be persuasive evidence on a claim for adverse possession. However, that the claimant paid taxes (or carried on the tax roll as the owner in this case) is but one of many factors that may support a claim of adverse possession, and is not itself conclusive. See e.g. *Monroe, supra* at 51-52; *Corby v Thompson*, 196 Mich 706, 711; 163 NW2d 80 (1917). Here, plaintiff's actions in caring for the land and mowing the weeds to keep the property compliant with city ordinances, in addition to carrying the property as the owner on its tax roll, demonstrates its intention to claim the land as its own.

Furthermore, plaintiff satisfied the requirement that it had actual, visible, open, notorious, exclusive, and uninterrupted possession that was hostile and under claim of right continuously beyond the statutory period of fifteen years since they have been listed as the tax owner and have mowed the lawn and cared for the land for a period of more than twenty years.

In *Davids, supra* at 72, this Court found that the plaintiff had established fee simple title of an undeveloped parcel of property by adverse possession where he took under color of title,

paid property taxes, posted "no trespass" signs, built a fence, and placed posts and chains across the entrance. *Id.* In this case, plaintiff took possession of lots 82-85 under color of title, was listed as the owner for tax purpose (carried the property on its tax roll), informed those inquiring about the land that it was plaintiff's land, and regularly maintained the lawn for a period of more than twenty years. Plaintiffs' acts were of such character as to indicate it openly and publicly assumed control or use consistent with the character of the disputed property. *Monroe, supra* at 52; *Denison, supra* at 443.

Defendant argues that adverse possession has not been established pursuant to *Bankers Trust Co of Muskegon, supra* at 464-465, which held that the plaintiff's occasional mowing of the defendant's grass did not reasonably apprise the defendant that another was assuming control of the property. However, there is nothing plaintiff's documentation supporting that the grass mowing was sporadic and was coupled with the property being listed as plaintiff's property on the tax roll, thus, we find no merit to this argument.

Plaintiff's motion for summary disposition was supported by documentation, which established its adverse possession claim. See MCR 2.116(G)(4); *Maiden, supra* at 120; *Smith, supra* at 455. The party opposing the motion then has the burden of showing by evidentiary materials that a genuine issue of disputed fact exists, *Smith, supra*; and the disputed factual issue must be material to the dispositive legal claims, *Auto Club Ins Ass'n, supra* at 333; 671. The existence of a disputed fact must be established by admissible evidence. MCR 2.116(G)(6); *Maiden, supra* at 121. Defendant presented no documentary evidence in response to plaintiff's motion for summary disposition, in order to raise a genuine issue fact. As such, we find, on review de novo, summary disposition is properly granted in favor of plaintiff on the basis of adverse possession.⁷

Affirmed.

/s/ Henry William Saad
/s/ Kathleen Jansen
/s/ Jane E. Markey

⁷ Because we find that summary disposition was proper on the basis of adverse possession we need not address defendant's arguments that the trial court erred in denying defendant's motion for summary disposition and in granting plaintiff's motion because proper notice was not given for the redemption period.